IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.450 OF 1989

Genbhau Kondiba Kolekar ...Appellant

vs.

1.Tatyaba Appa Kolekar

2.Sahadu Kondiba Kolekar
(since deceased through L.Rs.)
2a. Dadabhau Sahadu Kolekar
2b.Pradhan Sahadu Kolekar
2c.Sampat Sahadu Kolekar
2d.Ganpat Sahadu Kolekar
2e.Rakhmabai Sahadu Kolekar
2f.Kondabai Sahadu Kolekar

3. Rajaram Kondiba Kolekar
4. Maharashtra Land Development Bank
(i.e.Maharashtra Pune District
Sahakari Bhuvikas Bank) ...Respondents

Ms Anjali Helekar for the Appellant
Mr.Vilas Tapkir i/b Mr.A.P.Vaze for Respondent No.1
Mr.Mandar Limaye for Respondent Nos.2-a to 2-f.

CORAM: A.S.OKA,J.
DATE : NOVEMBER 27,2007.

ORAL JUDGMENT:

1. The Second Appeal has been preferred by the unsuccessful original first Defendant in a suit filed by the first Respondent for perpetual injunction. A suit was filed by the first Respondent claiming to be the owner of the suit land Block no.1590 at village Koyali, Taluka Khed, District Pune. In the suit, assertions have been made that the defendants in the suit are not concerned with the suit land and they are trying to obstruct the peaceful possession of the first Respondent.

2. The suit was contested by the Appellant by filing a written statement. The said written statement has been adopted by other two defendants. It was stated that the land bearing Block No.1590 comprises of Survey No.350/4-C. It was asserted that the father of the Defendants was the tenant of the land bearing Survey No.350/4-C. It was contended that after an order was passed under section 32-G of the Bombay Tenancy and Agricultural Lands Act,1948 (hereinafter referred to as the said Act) in favour of the father of the defendants, the price was paid by the defendants' father. Therefore, it was urged that the father and after his demise, the defendants became the owners of the suit land.

3. The trial court held that the first Respondent has proved his ownership and possession over the suit property. The trial court held that the defendants have failed to prove that they have become the owners of the land bearing survey No.350/4-C by virtue of section 32-G of the said Act of 1948 as in the proceeding under section 32-G/2 the land was already restored to the first Respondent-plaintiff. Therefore, the trial court proceeded to pass a decree for perpetual injunction. An Appeal preferred by the present Appellant was dismissed. The Appellate Court relied upon an order dated 3rd July 1969 purportedly passed under section 32-P of the said Act of 1948 by which the possession of the land was ordered to

be restored in favour of the first Respondent. The Appellate Court has referred to the certificate of sale under section 32-M of the said Act granted in favour of the defendants on 7th February 1980. The Appellate Court referred to the fact that the certificate was granted after consolidation scheme was implemented in the year 1975 and therefore the certificate under section 32-M will confer no right on the defendants.

4. The Second Appeal was admitted on 11th August 1989 by observing that the grounds 1,2 and 3 of the Memorandum of Appeal raise substantial questions of law. The said grounds read thus :

"(1) The substantial question of law that arises for consideration in this appeal is whether under the amended provisions of section 32-M of the Bombay Tenancy and Agricultural Lands Act,1948 (hereinafter referred to as the 'Tenancy Act') which was amended by Maharashtra Act No.31 of 1965, can the sale of the suit land bearing S. No.350/4-C (included in Gat No.1590 under Consolidation Scheme) admeasuring 19 gunthas in favour of the Appellant-tenant under the Tenancy Act be declared in-effective for the only reason that the Appellant failed to pay the purchase price fixed under Section 32-G of the said Act without exhausting all the modes of recovery of the purchase price as embodied in the said Section 32-M.

(2) Sub-section (3) of section 32-K of the Tenancy Act which provides for ‘Mode of payment of price by tenant purchaser and the power of the Tribunal to recover purchase price’ states thus :

"(3) If a tenant-purchaser fails to pay the entire amount of purchase price within a period fixed under the provisions of this section or is in arrears of four instalments where the number of instalments fixed is four or more, and all the instalments in any other case, the amount of purchase price remaining unpaid and the amount of interest thereon at the rate of 4 1/2 per cent per annum, if any shall be recoverable by the Tribunal as arrears of land revenue".

. This provision envisages that the tenant purchaser does not loose his right of purchase under the Tenancy Act on mere failure to pay purchase price fixed under the Said Act, but the duty is cast upon the Tribunal to recover the same with interest an arrears of land revenue and when such price is recovered as arrears of land revenue the sale or purchase would become effective under section 32-M of the Tenancy Act.

(3) Second part of sub-section (1) of section 32-M of the Act provides as follows :

"(1).....In the event of failure of recovery of

purchase price as arrears of land revenue under sub-section (3) of section 32-K the purchase shall be ineffective and the land shall be at the disposal of the Tribunal under section 32-P and any amount deposited by such tenant purchaser towards the price of the land shall be refunded to him."

. Then sub-section (2) of section 32-M provides as under :

"(2) Where the purchase of any land has become ineffective for default of payment in time of the price in lump sum or in instalment, but the tenant purchaser has never the less continued in possession of the commencement of the Bombay Tenancy and the Agricultural Lands (Amendment) Act,1964 then the purchase of the land shall not be deemed to be ineffective until the Tribunal fails to recover the amount of purchase price under sub-section (3) of section 32-K.

. It will thus be seen that two of these conditions must be in operation before section 32-M could operate. The first is that the sale or purchase must be declared in-effective under sub-section (1), and the second condition is that inspite of the declaration of purchase has become ineffective, the tenant must continue in

possession on the date when the amendment came into force. In the present case both the conditions of section 32-M are not fulfilled. Firstly, there is no evidence adduced on record to show that the Tribunal failed to recover the amount of purchase price from the tenant-purchaser is in arrears of land revenue and, secondly there is nothing on record to show that the tenant-purchaser was not in possession of the suit land on the date on which the Amendment Act of 1964 came into force. On the contrary, the evidence on record shows that proceeding under section 32-P of the Tenancy Act were initiated for the first time in the year 1966 and the mutation entry at Exhibit 54 shows that the possession of the suit land was restored to the Plaintiff under Order dated 3rd July 1969. Obviously, therefore, the Appellant as a tenant-purchaser was in possession of the suit land on the date the Amending Act of 1964 came into force. The order passed by the Tenancy Tribunal, under section 32-P that the purchase of suit land by tenant-purchaser was ineffective under section 32-M, was therefore wholly illegal and unjust and the restoration of the suit land to the Plaintiff is also illegal and without sanction of law."

5. The submission of the learned Advocate for the Appellant is that the certificate under section 32-M has attained

finality and the said certificate will relate back to the order passed under section 32-G on 22nd January 1960. The submission is made that the applicability of Consolidation Scheme in the year 1975 will not affect the certificate under section 32-M of the said Act of 1948. It is, therefore, submitted that in view of the said certificate, the first respondent cannot be said to be an owner of the property in respect of which the said certificate has been issued and therefore, there was no occasion for the trial court to pass a decree of perpetual injunction.

6. The learned Advocate for the first Respondent submitted that much prior to issuance of the certificate, an order was passed on 3rd July 1969 under section 32-P of the said Act of 1948 under which the defendants were dispossessed and the first Respondent was put in possession. He submitted that notwithstanding the grant of certificate under section 32-M of the said Act of 1948, which was done belatedly, the possession of the first Respondent on the date of institution of the suit has been established and therefore, the courts below were justified in granting a decree of perpetual injunction which needs no interference in the Second Appeal.

7. I have carefully considered the submissions. It will be necessary to refer to the findings recorded by the Appellate Court in paragraph 12 of the Judgment. The Appellate Court

has referred to the extract of mutation entry at Exh.54 which refers to the order made on 3rd July 1969 purporting to be an order under section 32-P of the said Act of 1948 under which the possession of area of 19 gunthas out of survey no.350/4-C was restored to the first Respondent. In paragraph 13 of the Judgment the Appellate court has referred to the certificate under section 32-M issued on 7th February 1980. while referring to the said certificate the Appellate court has held thus :

"13...It was argued that in view of the provisions of the B.T. & A.L. Act, this certificate is the conclusive proof of the ownership. According to me, in view of the admitted facts in the present case, this Certificate does not take us anywhere, it has been admitted by the Defendant No.1 and it is also a matter of record that the consolidation scheme had been implemented, in this village somewhere in the year 1975 and the land bearing Survey No.350/4-C was then included in Gat No.1590. According to me, with this inclusion of the land Gat no.1590, the land Survey No.350/4-C has lost its separate existence. If this is so, then there was no question of granting any certificate under section 32-M of the B.T.& A.L. Act in respect of the land Survey No.350/4-C. According to me, this certificate, produced at Exh.65, is baseless and it does not confer any rights upon the present Defendant No.1..."

8. An order under section 32-G of the said Act of 1948 was passed much prior to the Consolidation Scheme which was applied in the year 1975. In view of section 85 of the said Act of 1948, the Civil Court was not competent to record a finding that a certificate under section 32-M was baseless and the said certificate does not confer any title. As stated above, the Appellate Court has referred to the order under section 32-P which is referred to in the extract of mutation entry. The original order under section 32-P does not appear to be on record. Even going by the mutation entry, the said order is of the year 1969 whereas the certificate has been granted under section 32-M in the year 1980. The certificate under section 32-M is the conclusive evidence of the purchase of the land in accordance with section 32-G of the said Act of 1948 which in any event has taken place much prior to date on which the Consolidation Scheme was brought into force. It is not in dispute that the certificate relates to survey 350/C-4 which forms part of the suit land bearing Block No.1590. In the light of the section 85 of the said Act 1908 the civil court could not have recorded the finding of ownership in favour of the first Respondent-landlord in respect of the land bearing survey no.350/4-C.

9. The suit filed by the first Respondent is on the title as an owner. Therefore, unless the first respondent establishes

the title as owner, there could not have been a decree for perpetual injunction in favour of the first Respondent. It is argued that the area of block No.1590 is 34 gunthas and whereas the area on the land subject matter of certificate under section 32-M is 19 gunthas. It is obvious that the defendants had not claimed any right, title or interest or possession in respect of any property out of block No.1590 save and except the area of 19 gunthas out of survey 350/4-C. Thus, the injunction in respect of the land covered by certificate under section 32-M could not have been granted and there was no occasion to grant injunction in respect of the remaining portion of block No. 1590 as the defendants never claimed any right in respect of the remaining portion.

10. Even going by the findings recorded by the Appellate Court, there is a clear error of jurisdiction by the Appellate court by holding that the certificate under section 32-M was baseless and that it will not confer any right, title or interest.

11. Therefore, the Appeal must succeed. Hence, I pass the following order :

i) The impugned Judgments and decrees are set aside and subject to what is observed earlier, R.C.S.No.101 of 1979 stands dismissed.

JUDGE